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IN THE
Supreme Court of the United States

SCA HYGIENE PRODUCTS AKTIEBOLAG
AND SCA PERSONAL CARE, INC.,
Petitioners,

v.

FIRST QUALITY BABY PRODUCTS, LLC,
FIRST QUALITY HYGIENIC, INC.,
FIRST QUALITY PRODUCTS, INC., AND
FIRST QUALITY RETAIL SERVICES, LLC,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF OF BRIGGS & STRATTON CORPORATION, ROCKWELL AUTOMATION, INC., AND WISCONSIN MANUFACTURERS & COMMERCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Amici either are or represent companies that manufacture tangible products in the United States.[1] The laches defense is particularly important to manufacturers of tangible products like the Amici, because such products can often be easily modified, thus avoiding the potential for significant damages in the face of allegations of patent infringement. Laches discourages patent owners from unreasonably delaying suit and thereby prejudicing potential defendants by allowing damages that could have been avoided to continue to accrue. A decision that overrules established precedent recognizing laches as a defense would eliminate the patent owner's duty to avoid unreasonable and prejudicial delay, and deprive companies like the Amici of the opportunity to avoid unnecessary exposure to additional damages by designing around an asserted patent.

Briggs & Stratton Corporation ("Briggs") is the world's largest manufacturer of small gasoline engines. Briggs is also a leading manufacturer of generators, lawn and garden equipment, and related service parts and accessories. Headquartered outside Milwaukee, Wisconsin, Briggs was founded over 100 years ago and now employs over 5,700 people. Like other manufacturing companies that invest heavily in the designs of their products, Briggs

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[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money to fund the preparation or submission of this brief, and no person other than amici curiae and their counsel contributed any money to fund the preparation and submission of this brief. Petitioners' blanket consent is on file with the Clerk of the Court, and Respondents have consented to the filing of this brief.

has an interest in preserving the established defense of laches in patent litigation as set forth in *A.C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (en banc), and reaffirmed by the Federal Circuit in this case. A Briggs subsidiary is currently a defendant in *Exmark Mfg. Co., Inc. v. Briggs & Stratton Power Prods. Grp., LLC*, No. 8:10-cv-00187 (D. Neb.), a patent infringement case in which the plaintiff waited over 10 years to sue Briggs. Briggs asserted laches as a defense and is currently appealing the district court's decision on that issue, among others, to the Federal Circuit. This Court's decision regarding the continued viability of the laches defense in patent infringement cases may affect Briggs's potential liability in the *Exmark* case and in future litigation.

Rockwell Automation, Inc. ("Rockwell") is the world's largest company dedicated to industrial automation power, control and information solutions for manufacturers. Rockwell's products and services are designed to reduce total cost of ownership, maximize asset utilization, improve time to market, and reduce enterprise business risk. Its two operating segments, headquartered in Wisconsin and Ohio, employ about 8,500 people in the United States. Rockwell serves major market segments of the U.S. economy, including food and beverage, transportation, oil and gas, metals, mining, and life sciences.

Wisconsin Manufacturers & Commerce ("WMC") is the Wisconsin state chamber of commerce, the state manufacturers' association, and the state safety council. Founded in 1911, WMC is Wisconsin's leading business association dedicated to making Wisconsin the most competitive state in the

nation. WMC works to advance policies that are in the public interest of Wisconsin and the nation. Currently, the association has nearly 3,800 members, including both large and small manufacturers, service companies, local chambers of commerce, and specialized trade associations.

SUMMARY OF ARGUMENT

The continued availability of the well-established laches defense furthers the purposes of patent law and is good public policy. Laches incentivizes timely enforcement of patents by ensuring that: (1) patent disputes are heard when the relevant evidence is fresh; and (2) the risk of significant infringement damages may be avoided by modifying products—often in innovative ways that benefit the public—so that they are non-infringing.

In Briggs's case, for example, it was unaware of the asserted patent (issued in 1999) until a lawsuit was filed in 2010. The patent at issue covered the shape of a lawn mower "baffle," a bent piece of metal that directs airflow. Had it been sued earlier, Briggs could have avoided the accrual of years of potential damages by easily and inexpensively altering the shape of its baffles to avoid any question of infringement; indeed, when the plaintiff finally did sue, Briggs was able to modify its products within a few months for far less than the cost of a litigation defense. In addition, the Briggs employee who designed the accused product feature in the late 1990s left the company long ago. Briggs was thus directly disadvantaged in its defense by the plaintiff's decade-long delay in bringing suit. In the Briggs case and in cases like it, laches can bar the plaintiff from recovering damages that the accused infringer could have avoided, and/or better defended

itself against, if the plaintiff had not unreasonably delayed in filing suit.

The laches defense, which incentivizes patent owners to sue within a reasonable period of time, is particularly important to manufacturers of tangible products like Briggs and the other Amici, because such products can often be easily modified. When promptly sued, manufacturers have the opportunity to avoid substantial additional damages by altering their products, often in innovative ways that benefit the public. This allows manufacturers to use their limited resources to make better products rather than defend against unreasonably delayed lawsuits. Prompt enforcement also means that a patent's validity is resolved sooner, which benefits the public by making clear what is and is not available for public use.

Were the Court to eliminate the laches defense in patent cases, owners of patents that are easy to design around would have an incentive to lie in wait to seek from manufacturers damages that never would have accrued had the patents been enforced earlier. The owners of such patents would wait for a competitor's most lucrative six-year period of sales before suing for infringement—whether the wait is six years, ten years, or more—in order to claim the largest possible amount of damages. Incentivizing such tactics is bad policy because it would allow patent owners to exploit the inherent uncertainties of litigation to extract settlements and/or to seek damages far in excess of the true value of easily-avoided patents. Permitting recovery of these inflated costs from manufacturers would, among other things, hinder innovation by reducing the resources available to manufacturers for research

and development, thereby undermining the purpose of patent law, enshrined in the Constitution, to "promote the progress of science and useful arts."

ARGUMENT

I. *Petrella* Does Not Require Elimination Of The Laches Defense In Patent Cases

Laches has been recognized as a valid defense in patent infringement cases as far back as 1893. *See Aukerman*, 960 F.2d at 1028 (citing cases). Twice in the past 25 years—in *Aukerman* and in *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311 (Fed. Cir. 2015) (en banc)—the Federal Circuit has explained why laches is and should be available in patent cases, and courts have consistently applied this established law. *See, e.g., Lautzenhiser Techs., LLC v. Sunrise Med. HHG, Inc.*, 752 F. Supp. 2d 988 (S.D. Ind. 2010); *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 679 F. Supp. 2d 512, 519 (D. Del. 2010); *Gossen Corp. v. Marley Mouldings, Inc.*, 977 F. Supp. 1346 (E.D. Wis. 1997). Petitioners seek to upend this settled and familiar precedent that has been uniformly applied across the country based on the Court's decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), a copyright case that analyzed a different statute with different language that protects different types of property in different ways. As Respondents have explained, the Federal Circuit correctly analyzed the statutory text, legislative history, and relevant caselaw in holding that the laches defense has traditionally been and remains available in patent cases. The Amici will not belabor those points here, but instead will explain why the Federal Circuit's decision makes sense in light of the purpose of patent law and the

differences between how patents and copyrights are created and protected. These differences help explain why the Court should reject Petitioners' attempt to change the law, and affirm the longstanding precedent that laches is a viable defense to patent infringement damages.

The purpose of patent law is "[t]o promote the progress of science and useful arts." U.S. Const. art. I, § 8. To further that purpose and to incentivize the creation of useful products that will benefit society, Congress has granted inventors "the right to exclude others from making, using, offering for sale, or selling the invention." 35 U.S.C. § 154(a)(1); *see also Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974). In exchange for this monopoly. the patent laws require public disclosure of the invention claimed, "which disclosure, it is assumed, will stimulate ideas and the eventual development of further significant advances in the art." *Kewanee Oil*, 416 U.S. at 481. Thus, "stopping infringement" is not the goal of patent law, but rather "a means to patent law's ends" of disclosure and dissemination, which "permit[s] others to benefit from useful inventions." *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1937 (2016).

The laches defense directly promotes this purpose. "The purpose of a laches defense is to punish dilatory patentees and in so doing to encourage all patentees to seek infringement remedies in a timely manner." *Odetics, Inc. v. Storage Tech. Corp.*, 14 F. Supp. 2d 785, 790 (E.D. Va. 1998), *aff'd*, 185 F.3d 1259 (Fed. Cir. 1999); *see also Troxler Elec. Labs., Inc. v. Pine Instrument Co.*, 597 F. Supp. 2d 574, 598 (E.D.N.C. 2009). Recognizing that the timely enforcement of patent

rights is critical to the patent system, the Federal Circuit has found that patent owners have a duty to police their rights, and that laches is one manifestation of that duty. *See Wanlass v. Gen. Elec. Co.*, 148 F.3d 1334, 1337-38 (Fed. Cir. 1998) (finding that because the period of delay for laches purposes can begin when a patentee has constructive knowledge of infringement, patentees have a duty to police their rights). Laches incentivizes patentees to enforce their rights in a timely manner, which "disseminate[s] knowledge about" patents, thus allowing others either to pay for use of the invention, which "permit[s] others to benefit," or to design around a patent, which "encourage[s] the development of useful inventions." *Halo*, 136 S. Ct. at 1937 Eliminating the laches defense would effectively eliminate the patent owner's duty to police its patent rights, thereby removing an established and effective tool for achieving the Constitutionally-prescribed goal of the patent system.

While patent and copyright laws share a Constitutional grounding, Congress has chosen to establish separate statutory regimes for the creation and enforcement of rights relating to the two different types of intellectual property. *Compare* 17 U.S.C. §§ 101-810 *with* 35 U.S.C. §§ 101-376. As the Federal Circuit pointed out in this case, among the many differences between the two statutory regimes is the fact that patent infringement, unlike copyright infringement, is a strict liability tort that can be committed by individuals or companies who are completely unaware of the patents they are infringing. *See SCA Hygiene*, 807 F.3d at 1330. This point bears emphasis and elaboration because this distinction helps explain why Congress would

permit the assertion of the laches defense in one area but not the other.

The Copyright Act grants the owner of a copyrighted work the exclusive right to "reproduce the copyrighted work," "prepare derivative works based upon the copyrighted work," "distribute copies" of the work, perform or display the copyrighted work publicly, and to perform the work publicly "by means of a digital audio transmission." 17 U.S.C. § 106. The Act holds liable as an infringer "[a]nyone who violates any of the exclusive rights of the copyright owner." 17 U.S.C. § 501. By the very nature of these rights, an infringer must not only know about the copyrighted work, he or she must also deliberately act to copy or use the work in order to infringe; one cannot "reproduce," "distribute copies" of, or "perform" a work without knowing about the work and choosing to perform these actions.

In contrast, the Patent Act requires no such deliberate action to take the work of another to impose liability for infringement. It simply provides that "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent." 35 U.S.C. § 271(a). While this definition of infringement can impose liability on those who deliberately steal the work of another, copying is not required to prove infringement. *See, e.g., Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1351 (Fed. Cir. 2002) (finding that copying "is of no import on the question of whether the claims of an issued patent are infringed"). The patent infringement statute is broad enough to impose liability on those who

independently develop products that practice the claims of a patent, those who are unaware that an invention is patented, and those who have a good faith belief that a patent is invalid or that they are not infringing. *See, e.g.*, *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1926 (2015) (noting that because direct patent infringement is a strict liability tort, "a defendant's mental state is irrelevant"). And under the doctrine of equivalents, even proof of literal infringement of a patent's claims is not always required. *See Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997) ("[A] product or process that does not literally infringe upon the express terms of a patent claim may nonetheless be found to infringe if there is 'equivalence' between the elements of the accused product or process and the claimed elements of the patented invention.").

In light of these principles, the Federal Circuit's conclusion that the language of the Patent Act permits the assertion of a laches defense, while the language of the Copyright Act does not, makes perfect sense because it furnishes an additional way to alleviate the consequences of conduct that may be innocent or inadvertent upon a showing of unreasonable delay and prejudice. The Court recently recognized and discussed in *Halo* how Congress has provided statutory mechanisms that allow infringers to be treated according to their level of culpability in order to make the punishment fit the crime, and explicitly tied these mechanisms to Congress's desire and intent to spare infringers who may not have been fully or knowingly culpable. The Court noted that as far back as 1854, it had recognized Congress's intention to avoid the "injustice of subjecting a defendant who acted in ignorance or good faith to the same treatment as the

wanton and malicious pirate." *Halo*, 136 S. Ct. at 1928 (citation and internal quotation marks omitted); *see id.* at 1932-34 (interpreting the enhanced damages provision of 35 U.S.C. § 284 to permit differential treatment of defendants based on different degrees of culpability). The Court also affirmed in *Halo* the principle that Congress can permit and even require courts to exercise their equitable discretion "to take into account the particular circumstances of each case." 136 S. Ct. at 1933. The laches defense allows courts to exercise exactly the same kind of differentiation of conduct and consequences to suit particular circumstances.

Moreover, as Respondents pointed out, patent law is "suffused with 'equitable approaches to judicial reasoning and lawmaking.'" (Resp. Br. at 4 (quoting Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 Yale L.J. 848, 913 (2016)).) For example, courts have long had the power to bar enforcement of a patent based on inequitable conduct. *See Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1285-90 (Fed. Cir. 2011). And district courts have always had inherent power to dismiss a case or limit recovery due to a plaintiff's egregious misconduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-45 (1991) (discussing inherent powers of federal courts, including the court's power to vacate its own judgment and the power to dismiss a lawsuit). This has been true even where the plaintiff's claim was authorized by a statute. *Id.* Laches is similar in that it is an exercise of the court's equitable power to correct an unjust result that might otherwise result from the rote application of a statute or legal rule. *See Abraham v. Ordway*, 158 U.S. 416, 420 (1895) ("[E]quity may, in the exercise of its own inherent powers, refuse relief

where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked."). These cases and doctrines show that the equitable powers of the courts have long co-existed with and reinforced the mandates of Congress set forth in the statutory patent law.

Because the nature of patentable inventions and the liability imposed for infringement of such inventions differs from the nature of copyrighted works and the liability imposed for infringement of such works, Congress chose to codify the availability of the laches defense in patent cases but not in copyright cases. The laches defense complements and reinforces the structure and purpose of the Patent Act by providing protection for individuals and companies who may not have been aware of a patent when the patent owner unreasonably delays in bringing suit and who suffered prejudice as a result of the delay. Accordingly, *Petrella* does not compel the Court to overrule the Federal Circuit.

II. The Continued Availability Of The Laches Defense In Patent Cases Is Good Policy

Preservation of the status quo is not only consistent with the language, purpose, and history of the Patent Act, it is also good policy Elimination of the laches defense would allow patent owners to lie in wait and seek to recover from product manufacturers damages that could have been avoided by, *e.g.*, designing around a patent if suit had been brought sooner. In other words, a patent owner's unreasonable delay in bringing suit creates potential damages that might never have existed, and laches prevents the patent owner from recovering damages that have arisen due to the

patent owner's own unreasonable delay. Further, the passage of time inherently benefits patent owners facing invalidity challenges. In cases in which invalidity is asserted, the prior art and the motivations to combine that art must be considered at the time of the invention, but the quantity and quality of such evidence necessarily dwindles over time. Memories of persons with important knowledge about the field at the time of invention inevitably fade. Documents are lost or destroyed in the ordinary course of business. The incentive for prompt enforcement that laches provides ensures more reliable decisions and equitable recovery of damages.

A. Incentives For Timely Action Benefit Patentees, Potential Infringers, And The Public

1. *Timely Enforcement Allows Accused Infringers To Design Around Patents, Encouraging Further Innovation*

Courts have long recognized that timely suit (or even specific notice of potential infringement, along with reasonable follow-up) can provide accused infringers with the opportunity to modify their behavior in order to avoid infringement. *See Vaupel Textilmaschinen KG v. Meccanica Euro Italia S.P.A.*, 944 F.2d 870, 877 (Fed. Cir. 1991) ("Notice is important for several reasons. It informs the accused infringer of the existence of the suit and that a subsequent suit will be filed against him. He can then change his activities to avoid liability. He can also bring a declaratory judgment action if the delay in waiting for a judicial determination would be a burden upon his proposed activities."); *Everspin Techs., Inc. v. NVE Corp.*, No. 12-474, 2014 WL 988458, at *9 (D. Minn. Mar. 13, 2014) ("If [plaintiff],

or its predecessor, had brought its suit before the presumption of prejudice at six years, [defendant] would have had the opportunity to either design around the [plaintiff's] patents or wait before investing its time and resources into products that may infringe."); *id.* ("[Defendant] has also argued that it could have prevailed against infringement claims earlier, licensed the technology, negotiated a settlement, or stopped developing new GMR sensor and isolator products."); *Odetics, Inc. v. Storage Tech. Corp.*, 919 F. Supp. 911, 922 (E.D. Va. 1996) (finding that "notice would have allowed [defendant] to take some action to save itself from the potential liability it now faces"), *vacated on other grounds*, 116 F.3d 1497 (Fed. Cir. 1997). One way a potential infringer modifies its behavior is by designing around patents once it becomes aware of them. "[D]esign around" behavior is beneficial because it "bring[s] a steady flow of innovations to the marketplace," *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985), thus furthering the Constitutional goal of "promot[ing] the progress of science and useful arts," U.S. Const. art. I, § 8.

The earlier a potential infringer is made aware of a claim for infringement, the better situated it is to design around the patent if possible, to negotiate a license, to exit the market, or to challenge the patent. Promoting early enforcement of patents is particularly important for manufacturers of tangible products like the Amici because a design modification is often easy and inexpensive to implement, with little effect on the overall commercial performance of the product. In the case of Briggs, the asserted patent relates to the specific shape of a "baffle" underneath a lawn mower—the baffle is simply a bent piece of metal. Within a few

months of being sued, and for far less than the cost of litigation, Briggs was able to change its manufacturing designs so that new lawn mower products had different baffles.

Briggs had been selling baffles like those accused of infringement since late 1998, nearly a year before the asserted patent issued in late 1999. If the plaintiff had brought suit—or at least informed Briggs of its allegations—before 2010, then Briggs could have avoided the accrual of years of potential damages or perhaps negotiated to avoid suit altogether. During plaintiff's decade-long delay, however, Briggs's product sales grew substantially, and plaintiff sought proportionately higher damages than it would have had it brought suit earlier. The increased size of plaintiff's damages demand was, therefore, of plaintiff's own making, and imposes needless costs on Briggs.

Were the Court to eliminate the laches defense in patent cases, other patent owners would be rewarded for acting strategically to delay bringing suit in order to recover higher damages, similarly imposing needless costs on manufacturers that may not even have been aware of these owners' patents. Such a plaintiff would attempt to exploit the larger amount of accused product sales to extract a higher settlement or to seek a jury award that exceeds the real value of the patent. This economic harm could be inflicted in any situation where a patent that is easily designed around is asserted against a tangible product manufacturer after an unreasonable delay. This type of harm would hinder innovation by, among other things, reducing the resources available to manufacturers for research and development to create new products and to improve existing ones.

2. *Laches Provides Security That Incentivizes Investments In Product Development*

For the many companies that prefer to avoid patent litigation altogether, the availability of a laches defense provides comfort that their investments in new technology or business expansion will not be undermined by patent owners who lie in wait for those investments to pay off, only to bring suit after an unreasonable delay. Courts have long recognized this as a purpose of laches:

> When patentees are dilatory, putative infringers, unaware of their infringement, may reasonably continue and even expand their infringing activities, thereby increasing both the magnitude of their ultimate liability and their stake and investment in the infringing activity. In these circumstances, it is unfair to penalize the infringer, who, after all, is only acting reasonably during the laches period. By contrast, it is fair to penalize the patentee, who is either aware of the infringement and is deliberately delaying any notice of infringement, or is ignorant of the infringement by virtue of its failure to police the patent adequately.

Odetics, Inc., 14 F Supp. 2d at 790 n.15.

This case provides a perfect example of the fact pattern identified in *Odetics*: First Quality was informed of potential infringement; it studied the issue in good faith and concluded it did not infringe

any valid claims; it explained this belief to SCA; then SCA fell silent for over six years, during which time First Quality made significant economic investments in the relevant product. First Quality then had to face a costly and time-consuming patent infringement lawsuit with exposure to potentially large damages. Even if an accused party attempts to avoid a dispute by spending time and money to change its products, it is unfair for the patent owner to wait six years and then bring suit alleging that the changes were insufficient to avoid infringement.

Briggs's case provides another real-world example. During the plaintiff's delay from 1999 until it filed suit in 2010, Briggs made significant investments in its products. In 2004, Briggs acquired a company that had been manufacturing and selling the accused products since late 1998. The amount that Briggs paid for that company may have been less if plaintiff had enforced its patents in a reasonably timely manner. In 2006, Briggs invested millions of dollars in restructuring its commercial lawn mower operations by, among other things, re-designing a line of mowers to use designs that the plaintiff, years later, eventually accused of infringement. Briggs also invested significant capital in expanding its product lines that included the feature later accused of infringement. Had plaintiff brought suit against Briggs in 2004, Briggs could have avoided damages thereafter by altering its product, just as it did when it was finally sued in 2010.

Plaintiff's delay in the Briggs case threatens the viability of Briggs's investments. Manufacturers of tangible products routinely make investments like those made by Briggs as described above. They

invest in tooling, marketing, the acquisition of other companies, and uniformity in manufacturing across their product lines. A patent owner's duty to police its patents diligently ensures that manufacturers can account for the risk of infringement around the time that such investments are made, and the laches defense ensures that these investments will not be undermined later by a patent owner's unreasonable delay in filing suit. Absent laches, more manufacturers' investments will be at risk, raising the costs of product manufacture, reducing resources available for innovation, harming the public, and thwarting the Constitutional purpose of promoting the progress of science and useful arts.

Many other cases demonstrate how the laches defense can protect investments and expansion of sales made during periods when patentees could have enforced their rights but unreasonably delayed in doing so. *See, e.g., Medinol Ltd. v. Cordis Corp.*, 15 F Supp. 3d 389, 408-09 (S.D.N.Y. 2014) (finding defendant suffered economic prejudice when it had made substantial investments during the period of delay); *ABB Robotics, Inc. v. GMFanuc Robotics Corp.*, 828 F. Supp. 1386, 1394 (E.D. Wis. 1993) (holding "as a matter of law that increasing sales [without additional evidence of capital investments] may constitute economic prejudice") (internal emphasis omitted), *aff'd*, 52 F.3d 1062 (Fed. Cir. 1995); *Odetics, Inc.*, 919 F Supp. at 923 (finding that during the period of delay, the defendant "made a substantial investment in the development, manufacturing, and marketing of its systems, including expanding its product line in the 1990s"); *Potash Co. of Am. v. Int'l Minerals & Chem. Corp.*, 213 F.2d 153, 156 (10th Cir. 1954) ("It is equally inequitable for the patent owner to sleep on

his rights and lead an infringer to make large investments in the belief that he is not infringing or that the patent rights are not to be pressed.").

Laches also provides certainty that investments will not be undermined by gamesmanship that serves no other purpose than to inflict needless, avoidable costs on one party for the financial benefit of another. A ruling that eliminates or restricts the availability of laches will negatively impact the Amici's and other product manufacturers' ability to forecast the costs of commercializing products. These costs would diminish resources that otherwise could have been spent making better products for the public.

3. Laches Reduces Wasteful "Patent Troll" Litigation

A related benefit of the availability of the laches defense is its effect on reducing wasteful litigation by so-called "patent trolls," *i.e.*, companies whose sole business is the assertion of patent infringement lawsuits. As Congress, the executive branch, the courts, and scholars have recognized, patent trolls impose significant costs on our judicial system, the business community, and the public. *See, e.g.*, Press Release, House Judiciary Committee Chairman Bob Goodlatte, *Goodlatte Introduces Patent Litigation Reform Bill* (Feb. 5, 2015), http://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=266 (announcing introduction of a patent litigation reform bill intended to reduce litigation by patent trolls); Executive Office of the President, *Patent Assertion and U.S. Innovation* (June 2013), https://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf (concluding that "[a] review of the

evidence suggests that on balance, such patent assertion entities (PAEs) (also known as 'patent trolls') have had a negative impact on innovation and economic growth."); *Overstock.com, Inc. v. Furnace Brook, LLC*, 420 F. Supp. 2d 1217, 1222-23 (D. Utah 2005) (expressing concerns about patent trolls), *aff'd*, 191 F App'x 959 (Fed. Cir. 2006); James Bessen et al., *The Private and Social Costs of Patent Trolls*, 34 Regulation 26, 26 (Winter 2011–2012) (estimating that "defendants have lost over half a trillion dollars in wealth—over $83 billion per year during recent years" due to litigation by patent trolls and concluding that this litigation "has not improved incentives to innovate").

Laches provides an important tool to reduce litigation that serves only to increase costs and stifle innovation. Many patent trolls actively seek patents that have historically not been enforced, or acquire patents and then delay enforcement themselves, so that when they bring suit they have more leverage to negotiate higher settlements due to the increased royalties accrued during periods of delay. Further, in many cases, patent trolls acquire their patents from companies that have chosen not to enforce them for many years. Laches would prevent a plaintiff from recovering damages for the time during which the prior owner chose not to enforce a patent. Without laches, patent trolls would be able to unfairly benefit from their own, or another's, unreasonable delay in enforcing a patent.

B. Retaining The Longstanding Laches Defense In Patent Cases Will Not Result In A Flood Of Premature Litigation

Contrary to Petitioners' unsupported assertion, retaining the longstanding laches defense in patent

cases will not "encourage patent holders to litigate prematurely in order to avoid losing their rights." (Pet. Br. at 5.) As discussed above, laches has been established in patent cases for over a century and was explicitly reaffirmed more than two decades ago in *Aukerman*, which provides very clear guidance about how to prove or defeat a laches defense. *See* 960 F.3d at 1032-39. Patent owners are well-accustomed to dealing with laches defenses, and Petitioners provide no evidence to support their claim that maintaining the status quo will somehow affect litigants' behavior.[2]

Moreover, proving laches still requires a showing of both unreasonable delay and prejudice to the accused infringer arising from that delay. *See Aukerman*, 960 F.2d at 1032. As discussed above, it is good policy to bar recovery when these elements are proven because unreasonable delay stifles innovation, thwarting the Constitutional purpose of patent laws and harming manufacturers and the public. The Amici do not suggest any change to the longstanding patent standard or to the modifications made by the Federal Circuit in this case to account for the Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). *See*

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[2] Petitioners' suggestion that retaining the laches defense undermines predictability, *see* Pet.'s Br. at 46, similarly lacks merit. The standard for proving laches under *Aukerman* and *SCA Hygiene* is uniform across the country, and just this past term, the Court recognized that in patent cases, district courts applying their discretion "are 'to be guided by [the] sound legal principles' developed over nearly two centuries of application and interpretation of the Patent Act." *Halo*, 136 S. Ct. at 1935 (quoting *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)).

SCA Hygiene, 807 F.3d at 1331-33. Instead, the Amici ask the court to preserve the law that has permitted the assertion of laches in patent cases for over a century.

CONCLUSION

For the foregoing reasons, the Court should hold that laches continues to be a viable defense in patent infringement actions.

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